BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERENCE D. MAHATHEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,756
AMERICAN CABLE & TELEPHONE, LLC	)	
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the July 10, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. David H. Farris of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 10, 2012, preliminary hearing and exhibits thereto; the transcript of the July 9, 2012, deposition of Jerry Perdun and exhibit thereto; the transcript of the July 2, 2012, deposition of Jeremy Noel; and all pleadings contained in the administrative file.

ISSUES

Respondent alleges claimant failed to tie off his safety lanyard while working on a ladder and in doing so, recklessly violated respondent's safety regulations. Respondent contends the ALJ erred by granting claimant workers compensation benefits. It asserts claimant violated company safety policy. Consequently, K.S.A. 2011 Supp. 44-501(a)(1)(D) precludes claimant from being awarded workers compensation benefits. Claimant contends he did not act recklessly and requests the Board to affirm the findings of ALJ Clark.

The issue before the Board is:

Did claimant violate respondent's safety policy? If so, does K.S.A. 2011 Supp. 44-501(a)(1)(D) preclude claimant from being awarded workers compensation benefits?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant was employed by respondent as a cable technician. One of claimant's job duties was to string cable television line from the customer's home to the pole. That required claimant to attach a cable line to a tap on a pole. In order to do this claimant would place a ladder against the pole, or hook the ladder to suspension wires using safety hooks that are affixed to the ladder.

Jerry Perdun, a former technician and manager for respondent, testified that he trained claimant to be a cable technician for respondent. He described in great detail the training he gave claimant. Mr. Perdun indicated that if a cable technician cannot get the ladder to the tap where the cable line is to be attached, the technician is to call Cox Cable for assistance. Thus, if a tree obscures the suspension wire, the cable technician is to call Cox Cable. He also testified that if a ladder does not feel secure when the cable technician climbs it, the cable technician is not supposed to climb until the ladder is secure.

Mr. Perdun testified that cable technicians are taught that when they get to the top of the ladder they are to hook their safety lanyard over the suspension wire, through the ladder and to the technician's safety belt. That insures neither the technician nor the ladder will fall to the ground. During claimant's training, he was only observed violating a safety rule once by Mr. Perdun. On that occasion, claimant realized he was violating a safety rule and corrected it on his own volition.

Claimant verified he had received training on respondent's safety policies from Jerry Perdun. He was provided a training manual and was familiar with the procedures in the manual. Claimant testified he followed those procedures and had never been reprimanded, suspended or given a warning for improper use of safety equipment.

On April 18, 2012, claimant was stringing cable line from a customer's house to a pole. Claimant set up his ladder and thought he had it hooked on a suspension line using the safety hooks, but a tree obscured his view of the top of the ladder. He then climbed the ladder with the cable line in his hand. As claimant reached the middle of the ladder, he pulled the cable line through the tree to make sure it would not get hung up in the branches. Claimant then climbed to the top of the ladder and reached to grasp his safety harness to hook it up to the suspension wire using a safety lanyard. While doing so, claimant's weight shifted, causing the ladder to come off the suspension wire. That resulted in claimant falling approximately 25 feet to the ground onto grass.

When asked why the ladder fell, claimant testified, "Because the hooks on the ladder were not on the suspension wire, which I, before climbing the tree, looked up, could not see whether they were hooked or not, and thought that they were hooked."[1]

After claimant hit the ground he laid there a few minutes. A sheriff's deputy saw claimant fall and came to claimant's aid. The sheriff's deputy helped claimant remove his boot from the left foot, as the left ankle was injured in the fall. An ambulance was called and claimant used his cell phone to call his boss and report the accident.

Brandon Webb, a lead technician for respondent and claimant's supervisor, testified concerning the use of the safety harness and lanyard. It was his testimony that respondent required cable technicians "tie off" the safety lanyard when leaving the ground.[2] Mr. Webb testified that tying off means wrapping the safety lanyard that is hooked to the worker's safety harness around the ladder and suspension wire at six or 28 feet.

Mr. Webb did not observe the accident. He arrived at the accident site shortly after the accident occurred and spoke to claimant. Mr. Webb testified that he was told by claimant that he did not tie off the safety lanyard before performing the work that was to be done. According to Mr. Webb, failure to tie off the safety lanyard was a violation of respondent's safety policy.

Mr. Webb testified that claimant also indicated he was unable to see the suspension wire that the safety hooks were supposed to be hooked on because of the tree limbs. According to Mr. Webb, respondent's safety policy provided that technicians were not to proceed up a ladder if they could not see the suspension wire. Claimant violated that policy by climbing the ladder even though the suspension wire was shrouded in tree limbs.

Claimant disputed the testimony of Mr. Webb concerning the conversation they had on April 18, 2012, at the accident scene. Claimant testified he told Mr. Webb the fall occurred during the process of tying off his safety harness.

Jeremy Noel, a Sedgwick County sheriff's deputy, testified that he was directing traffic on April 18, 2012, near the scene of claimant's accident. He observed claimant hanging onto the ladder and the ladder falling backwards into a ditch. At the time claimant was at the top of the ladder. Deputy Noel went to claimant's aid, and found claimant lying on his back holding his ankle. Deputy Noel testified that during a conversation with claimant, he indicated he had put the ladder through some trees and had hooked it to a wire. However, claimant could not actually see the wire to determine if the ladder was hooked to it. Claimant told Deputy Noel that a strong gust of wind came up and blew the

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[1] P.H. Trans. at 14-15.

[2] *Id.*, at 26-27.

ladder over. Deputy Noel testified claimant stated he was pulling a cable wire and had not yet hooked up his safety belt.

On cross-examination, Deputy Noel testified he did not observe claimant intentionally climbing the ladder without attaching the hooks to the suspension wire. Nor did he observe claimant do anything that was reckless. Deputy Noel testified claimant indicated he was going to pull up the cable line and then hook up his safety belt.

ALJ Clark authorized Dr. Michelle Klaumann to be claimant's authorized treating physician and ordered all claimant's medical paid. He also ordered temporary total disability payments to begin April 18, 2012, until claimant was released. With regard to respondent's allegation that claimant violated respondent's safety policy, ALJ Clark stated,

> This Court finds that the Claimant did not deliberately intend to injure himself, did not fail to use a guard required by statute, did not willfully fail to use a reasonable and proper guard, and did not recklessly violate the Respondent's work place safety rules. (See K.S.A. 44-501(a)(1))[3]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[5]

K.S.A. 2011 Supp. 44-501(a) states in part,

> (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . . .
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations . . . .

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[3] ALJ Order (July 10, 2012).

[4] K.S.A. 2011 Supp. 44-501b(c).

[5] K.S.A. 2011 Supp. 44-508(h).

In *Foos*,[6] the Kansas Supreme Court held: "Once the claimant has met his or her burden of proving a right to compensation, the burden of proving an employer's relief from that liability through K.S.A. 44-501(d)(2) is upon the employer."

This Board Member finds that claimant did not violate respondent's safety policy by failing to attach his safety lanyard. Claimant testified that when he fell, he was in the process of attaching his safety lanyard. Mr. Perdun testified that he trained claimant to attach the safety lanyard when he reached the top of a ladder. Deputy Noel testified that when he spoke to claimant immediately after the accident occurred, claimant indicated he had been in the process of attaching his safety belt when a gust of wind caused him to fall. Mr. Webb testified he was told by claimant that he did not attach his safety lanyard before performing his work. This Board Member finds the testimony of claimant and Deputy Noel more credible than that of Mr. Webb.

Claimant testified he would not have climbed the ladder if he knew the safety hooks were not attached to the suspension wire. However, prior to climbing the ladder claimant acknowledged he could not see if the ladder's safety hooks were attached to the suspension wire. Yet, he made a decision to climb the ladder anyway. That violated respondent's safety policy. Claimant testified the accident occurred because the safety hooks on the top of the ladder were not attached to the suspension wire. The question then becomes whether or not claimant recklessly violated respondent's safety policy. "Reckless" is not defined by the Kansas Legislature in the Workers Compensation Act.

The definition of reckless in tort claims was discussed at length in *Hoard*.[7] The Kansas Supreme Court quoted Restatement (Second) of Torts § 500 comment a (1963), which states:

> "**Types of reckless conduct.** Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> "For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .

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[6] *Foos v. Terminix*, 277 Kan. 687, Syl. ¶ 2, 89 P.3d 546 (2004).

[7] *Hoard v. Shawnee Mission Medical Center,* 233 Kan. 267, 662 P.2d 1214 (1983).

> "For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence."[8]

Until July 1, 2011, Kansas criminal law defined reckless conduct in K.S.A. 21-3201(c):

> Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable negligence," "wanton negligence" and "wantonness" are included within the term "recklessness" as used in this code.

The 2010 Legislature amended K.S.A. 21-3201 at L. 2010, ch. 136, sec. 13, effective July 1, 2011. K.S.A. 21-3201 is codified in K.S.A. 2011 Supp. 21-5202, which states in part:

> (j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

This Board Member is not convinced by the evidence that claimant recklessly violated respondent's safety policy. The record indicates claimant did not consciously disregard the risk of failing to properly hook the ladder to the suspension wire or the results that might occur. It was not until after the ladder fell that claimant came to the realization that the hooks were not on the suspension wire. Deputy Noel, who observed the accident, testified that he did not observe claimant acting recklessly. There is no testimony to indicate that while climbing the ladder, claimant knew it was not secure or was not hooked to the suspension line. In fact, claimant testified that he thought the ladder was hooked to the suspension wire and would not have climbed the ladder if he knew it was not affixed to the suspension wire. That statement indicates claimant was not recklessly disregarding respondent's safety policy.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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[8] *Id.*, at 280-281.

[9] K.S.A. 2011 Supp. 44-534a.

by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

WHEREFORE, the undersigned Board Member affirms the July 10, 2012, Order entered by ALJ Clark.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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John D. Clark, Administrative Law Judge

[10] K.S.A. 2011 Supp. 44-555c(k).